

Message Text

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ACTION L-03

INFO OCT-01 EUR-12 ISO-00 EB-08 COME-00 TRSE-00 OMB-01
OPIC-03 H-01 CIAE-00 INR-10 NSAE-00 JUSE-00 SP-02
SEC-01 /042 W
-----044111 111412Z /45
R 111223Z AUG 78
FM AMEMBASSY ROME
TO SECSTATE WASHDC 4848

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E.O. 11652: N/A
TAGS: BDIS, CPRS, IT
SUBJECT: RAYTHEON CLAIM - GOI PROVIDES WRITTEN RESPONSE

REF: (A) STATE 161901, (B) ROME 11256

SUMMARY. AS FOLLOW-UP TO ORAL PRESENTATION OF GOI POSITION ON RAYTHEON CLAIM REPORTED REFTTEL B, THE MINISTRY OF FOREIGN AFFAIRS (MFA) HAS FINALLY PROVIDED THE EMBASSY WITH AN AIDE MEMOIRE, GIVING THE GOI'S WRITTEN RESPONSE TO THE USG'S ESPOUSED CLAIM ON BEHALF OF RAYTHEON CORPORATION AND MACHLETT LABORATORIES, SUBMITTED TO THE MFA BY NOTE VERBALE NO. 51, DATED FEBRUARY 7, 1974. THE RESPONSE CONCEDES THAT THE REQUISITION OF RAYTHEON'S WHOLLY-OWNED SUBSIDIARY ELSI, WAS ILLEGAL, BUT REJECTS THE CLAIM THAT RAYTHEON THEREBY SUFFERED DAMAGES, ARGUING THAT THE SUBSIDIARY WAS ALREADY IN A STATE OF BANKRUPTCY AT TIME OF REQUISITION; THEREFORE, RAYTHEON'S CLAIM FOR DAMAGES IN ITS CAPACITY AS A SHAREHOLDER AND CREDITOR IS LEGALLY GROUNDLESS. TEXT OF RESPONSE IS TRANSMITTED BELOW IN PARAGRAPH 3. END SUMMARY.

1. WRITTEN RESPONSE TO RAYTHEON CLAIM IS IN THE FORM OF AN AIDE MEMOIRE, NO. 141/696, RELATING TO MEETING BETWEEN GIUSEPPE MANZARI, CHIEF OF DIPLOMATIC CLAIMS, WITH THE CHARGE ON JUNE 13 (REF B) AND WAS RECEIVED BY EMBASSY ON AUGUST 4.

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2. CONCEDING THAT THE REQUISITION WAS ILLEGAL, THE AIDE MEMOIRE ARGUES THAT:

A) THE REQUISITION DID NOT CAUSE DAMAGE TO RAYTHEON AND MACHLETT LABORATORIES AS SHAREHOLDERS BECAUSE THE INDEBTEDNESS OF THE COMPANY (ELSI) WAS SO LARGE THAT

1) UNDER ITALIAN LAW, THERE WAS NO CHOICE BUT TO FILE FOR BANKRUPTCY AND 2) UNDER BANKRUPTCY PROCEEDINGS, CREDITORS' CLAIMS TAKE PRECEDENCE OVER CLAIMS OF SHAREHOLDERS; THUS, IN THIS CASE THERE WAS NOTHING LEFT FOR SHAREHOLDERS;

B) TURNING TO CONSIDERATION OF DAMAGES AS A CREDITOR, THE CLAIM IS ALSO WITHOUT FOUNDATION BECAUSE A SHAREHOLDER (8.E. RAYTHEON), ACTING AS A FINANCIER OR GUARANTOR OF THE BANKRUPT COMPANY, CANNOT DEMAND GREATER PROTECTION THAN ANY OTHER CREDITOR. BECAUSE DAMAGES STEMMING FROM THE ILLEGAL REQUISITION HAVE ALREADY BEEN LIQUIDATED (BY VIRTUE OF AN ITALIAN COURT ACTION IN 1974 INVOLVING THE TRUSTEE IN BANKRUPTCY, WHICH AWARDED DAMAGES AMOUNTING TO 114 MILLION LIRE ON THIS ASPECT OF THE CASE), NO FURTHER OR SPECIAL CLAIMS CAN BE LODGED, AS THE AIDE MEMOIRE STATES, "BY THE FOREIGN CREDITOR".

3. BEGIN TEXT OF AIDE MEMOIRE (TRANSLATION) - QUOTE THE PURPOSE OF THE CLAIM FILED BY THE EMBASSY OF THE UNITED STATES OF AMERICA IN CONNECTION WITH THE CASE OF THE ITALIAN JOINT-STOCK COMPANY RAYTHEON-ELSI IS TO PROTECT, THROUGH A DIPLOMATIC ACTION, THE INTERESTS OF THE AMERICAN SHAREHOLDERS OF THE COMPANY, AND THE CLAIM IS BASED ON THE ASSERTION THAT THE DAMAGES THEY HAVE SUFFERED ARE ASCRIBABLE TO THE BEHAVIOR OF ITALIAN GOVERNMENTAL BODIES.

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1. THE FACTS MAY BE ASSUMED AS THEY HAVE BEEN EXPOUNDED BY CLAIMANT. SINCE IT WAS FOUNDED IN 1956, RAYTHEON-ELSI ATTAINED A PROGRESSIVE DEVELOPMENT UNTIL 1967, WITH CONTINUOUS INCREASES OF CAPITAL ALWAYS FURNISHED BY AMERICAN SHAREHOLDERS. IN 1967, A PLAN WAS LAUNCHED FOR THE REORGANIZATION OF ACTIVITIES AND THIS PLAN PROVIDED, INTER ALIA, FOR A SUBSTANTIAL REDUCTION OF LABOR. FOR VARIOUS REASONS, THE AFORESAID REORGANIZATION COULD NOT BE IMPLEMENTED AND, AROUND THE FIRST MONTHS OF 1968, THE IMPOSSIBILITY OF STOPPING THE CONTINUOUS IMPAIRMENT OF THE COMPANY'S FINANCIAL SITUATION WAS ASCERTAINED; THE BOARD OF DIRECTORS THEREFORE DECIDED (ON MARCH 16, 1968) THAT "THERE WAS NO OTHER ALTERNATIVE THAN TO DISCONTINUE THE COMPANY'S ACTIVITY". (SEE DOCUMENTS II-19 AND II-19 ATTACHED TO THE CLAIM).

AS A RESULT OF THE COMPANY'S DECISION TO CLOSE THE FACTORY, THE MAYOR OF PALERMO, BUT DECISION OF APRIL 1, 1968, ORDERED THE REQUISITION OF THE FACTORY AND RELATED EQUIPMENT BELONGING TO

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RAYTHEON-ELSI. SUBSEQUENTLY, ON APRIL 26, 1968, THE BOARD OF DIRECTORS FILED A PETITION IN BANKRUPTCY (ENCLOSURE III-16 TO CLAIM), AND THE TRIBUNAL OF PALERMO ADJUDGED RAYTHEON-ELSI BANKRUPT BY JUDGMENT OF MAY 16, 1968 (ENCLOSURE III-17). THE ORDER OF REQUISITION ISSUED BY THE MAYOR WAS RECOGNIZED AS BEING UNLAWFUL BY THE COMPETENT ITALIAN AUTHORITIES.

IN THIS CONNECTION ONE SHOULD ONLY ADD THAT THE COMPETENT PERSONS HAVING JURISDICTION IN THE BANKRUPTCY INSTITUTED PROCEEDINGS AGAINST THE MINISTRY OF INTERIOR IN ORDER TO ASCERTAIN THE LIABILITIES DERIVING FROM THE AFORESAID UNLAWFUL ACT. BY DECISION OF THE COURT OF APPEALS OF PALERMO, CONFIRMED BY THE COURT OF CASSATION, ALTHOUGH REJECTING "THE RELATION OF CAUSE AND EFFECT BETWEEN THE ORDER OF REQUISITION AND THE COMPANY'S BANKRUPTCY, SINCE IT HAS BEEN ESTABLISHED WITH CERTAINTY THAT THE STATE OF INSOLVENCY EXISTED PRIOR TO A DATE PRECEDING THAT OF REQUISITION", THE ARGUMENT OF THE TRUSTEE IN BANKRUPTCY, ACCORDING TO WHICH THE UNAVAILABILITY OF THE FACTORY RESULTING FROM THE REQUISITION HAD CAUSED DAMAGE TO THE ADMINISTRATION OF THE ESTATE IN BANKRUPTCY, WAS ACCEPTED, AND THE DAMAGES LIQUIDATED IN THE AMOUNT OF LIRE 114 MILLION.

2. THIS HAVING BEEN STATED, IT SHOULD BE POINTED OUT THAT THE U.S. CLAIM, EVEN THOUGH DWELLING ON VARIOUS WAYS IN WHICH
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BOTH THE ITALIAN GOVERNMENT AND THE REGIONAL GOVERNMENT BEHAVED, WHICH, IN THE UNITED STATES' OPINION, LAY OPEN TO MUCH CRITICISM, USES AS A LEGAL BASIS OF THE CLAIM FOR COMPENSATION THE ORDER OF

REQUISITION OF EQUIPMENT ISSUED ON APRIL 1, 1968 BY THE MAJOR OF PALERMO. IN THE CLAIM FILED BY THE AMERICAN EMBASSY, THE FACT THAT THE AMERICAN COMPANIES, RAYTHEON AND MACHLETT, ARE "SHARE-HOLDERS OF THE ITALIAN ELSI COMPANY" IS INVOKED (PAGE 30, PAR. B) IN SUPPORT OF THE DIPLOMATIC ACTION TAKEN AGAINST THE ITALIAN GOVERNMENT. ACCORDING TO THE EXACT WORDS USED IN THE UNITED STATES' NOTE (PAGE 53), THE CLAIM IS FILED "IN THEIR INTEREST OWING TO THEIR SHAREHOLDINGS IN ELSI'S CAPITAL".

LASTLY, FROM THE UNITED STATES' SIDE IT IS ASSUMED THAT THE DAMAGE SUFFERED BY THE AFORESAID SHAREHOLDERS ALLEGEDLY DERIVED FROM THE FACT THAT IT HAD NOT BEEN POSSIBLE, OWING TO THE REQUISITION AND CONSEQUENT BANKRUPTCY, TO PROCEED WITH AN ORDERLY LIQUIDATION OF THE COMPANY'S ASSETS THAT HAD ALREADY BEEN PROGRAMMED, BUT COULD NOT BE CARRIED OUT BY THE COMPANY'S ADMINISTRATIVE BODIES.

3. THE CLAIM FOR DAMAGES SEEMS TO BE GROUNDLESS INASMUCH AS THE RECORDS SHOW THAT THE ORDER OF REQUISITION, EVEN THOUGH UNLAWFUL, DID NOT CAUSE DAMAGE TO THE SHAREHOLDERS. AT THE TIME OF THE REQUISITION, THEY HAD ALREADY COMPLETELY LOST THE COMPANY'S CAPITAL STOCK, AND ACTUALLY, THE COMPANY'S INDEBTEDNESS WAS BY FAR IN EXCESS OF ITS TOTAL ASSETS. THIS SITUATION, ACCORDING TO ITALY'S BANKRUPTCY LAW, NO ONLY BROUGHT ABOUT THE OBLIGATION TO DECLARE THE COMPANY'S BANKRUPTCY, BUT ENTAILED AS A CONSEQUENCE FOREITURE OF THE DIRECTOR'S CAPACITY TO CONTINUE TO EXERCISE MANAGERIAL FUNCTIONS AND THEIR REPLACEMENT BY THE TRUSTEE IN BANKRUPTCY, FIRSTLY FOR THE PROTECTION OF CREDITORS.

THE TRUSTEE IN BANKRUPTCY IS REQUIRED TO DISTRIBUTE AMONG LIMITED OFFICIAL USE

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THEM (EMBASSY NOTE, I.E. CREDITORS) IN ACCORDANCE WITH THE PRINCIPLE OF PAR CONDICIO, THAT IS, IN AN AMOUNT PROPORTIONATE TO THE RESPECTIVE CREDIT CLAIMS, THE ASSETS REMAINING AS A RESULT OF LIQUIDATION. WHEN THE INDEBTEDNESS EXCEEDS THE PROCEEDS DERIVING FROM THE LIQUIDATION OF THE COMPANY'S PROPERTY TO THE EXTENT THAT IT DOES IN THIS CASE, SHAREHOLDERS ARE NOT ENTITLED TO RECEIVE ANYTHING; NOR, OBVIOUSLY, CAN THE DAMAGE AFFECT THEM (EMBASSY NOTE, I.E. SHAREHOLDERS), AS SUCH, TO AN EXTENT GREATER THAN THE LOSS OF THE COMPANY'S CAPITAL STOCK.

4. THE SITUATION DOES NOT CHANGE IF ONE CONSIDERS THE CLAIM PUT FORTH BY THE AMERICAN COMPANIES, I.E., OWNERS OF SHARES IN RAYTHEON-ELSI, FROM THE POINT OF VIEW OF THE DAMAGE THEY ALLEGEDLY SUFFERED AS A RESULT OF THE REQUISITION, AS CREDITORS OF THE ITALIAN COMPANY IN CONNECTION WITH DIRECT FINANCING OR AS GUARANTOR. WITHOUT DWELLING TOO LONG ON THE FACT THAT THE CLAIM WOULD THUS BE GROUNDLESS SINCE IT IS BASED ON THE PROTECTION OF SHAREHOLDERS AS SUCH, IT SHOULD BE NOTED

THAT A SHAREHOLDER, IN HIS CAPACITY AS FINANCING PARTY OR
GUARANTOR OF FINANCING, CANNOT DEMAND, IN A BANKRUPTCY PRO-
CEEDING, A GREATER PROTECTION THAN THAT TO WHICH ALL THE OTHER

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CREDITORS OF THE COMPANY ARE ENTITLED. AS IT HAS ALREADY BEEN
SAID, THE DAMAGE SUFFERED BY THE CREDITORS OF THE COMPANY (NOT BY
THE SHAREHOLDERS) OWING TO THE UNAVAILABILITY OF THE FACTORY HAS
ALREADY BEEN LIQUIDATED BY THE JUDICIAL AUTHORITIES IN FAVOR OF
THE TRUSTEE IN BANKRUPTCY, I.E., IN TRUST FOR ALL THE CREDITORS,
SO THAT NO SPECIAL CLAIM CAN BE ASSERTED IN THIS CONNECTION BY
THE FOREIGN CREDITOR. HE, IN ACCORDANCE WITH INTERNAL LAW, TO
WHICH NO EXCEPTION IS MADE UNDER INTERNATIONAL LAW, IS SUBJECT
TO THE BANKRUPTCY RULE OF "PARTICIPATION OF CLAIMANTS" IN THE
SENSE THAT ALL CREDITORS MUST PARTICIPATE, WITHIN THE LIMITS
PERMITTED BY THE BANKRUPTCY ASSETS, IN THE SETTLEMENT OF THEIR
RESPECTIVE CLAIMS. IN OTHER WORDS, EACH ONE OF THEM MUST BEAR
A LOSS COMMENSURATE WITH THE ASSETS REMAINING AS A RESULT OF
THE BANKRUPTCY LIQUIDATION (PAR CONDICIO CREDITORUM).

5. IN CONCLUSION, THE CLAIM IS JURIDICALLY GROUNDLESS,
BOTH FROM THE INTERNATIONAL AND INTERNAL POINT OF VIEW. NOR IS
THERE A POSSIBILITY OF REACHING AN AGREEMENT WHICH, APART FROM
JURIDICAL REASONS, WOULD TAKE INTO ACCOUNT THE FINANCIAL AND
POLITICAL ASPECTS SET FORTH IN THE CLAIM, INASMUCH AS ANY AGREE-
MENT FOR AN AMICABLE SETTLEMENT WOULD NOT BE VALID UNLESS IT IS
RATIFIED BY AN ACT OF PARLIAMENT IN ACCORDANCE WITH ART. 80 OF
THE CONSTITUTION. AND IT IS UNLIKELY THAT PARLIAMENT WILL
APPROVE ANY AGREEMENT WHICH, BEING AN EXCEPTION TO THE PAR CONDICIO
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CREDITORUM RULE, WOULD RUN CONTRARY TO THE CONSTITUTIONAL PRINCIPLE (ART. 3) OF EQUAL TREATMENT, TO THE PREJUDICE OF ITALIAN CREDITORS WHO WOULD CONTINUE, INSTEAD, TO BE SUBJECT TO THE LOSSES INVOLVED IN BANKRUPTCY. UNQUOTE - END TEXT.

4. COPIES OF AIDE MEMOIRE BEING POUCHED TO DEPARTMENT, L/C, IN BOTH ITALIAN LANGUAGE VERSION AND ENGLISH TRANSLATION CITED ABOVE. ORIGINAL BEING RETAINED AT EMBASSY. PLEASE ADVISE WHETHER DEPARTMENT/RAYTHEON WISHES EMBASSY TO PASS COPY TO RAYTHEON'S ITALIAN LEGAL REPRESENTATIVE STUDIO BISCONTI FOR PRECISE TRANSLATION IN LEGAL TERMINOLOGY.

5. COMMENT: IN THE AIDE MEMOIRE, MANZARI ADHERES LARGELY TO ARGUMENTATION HE PRESENTED ORALLY AT THE JUNE 13 MEETING WITH CHARGE. HOWEVER, THE WRITTEN VERSION DIFFERS SLIGHTLY IN THAT IT REFRAINS FROM FLATLY STATING THAT THE REQUISITION DID NOT IN ANY WAY AFFECT BANKRUPTCY PROCEEDINGS. INSTEAD, MANZARI TAKES THE FACT THAT DAMAGES STEMMING FROM THE REQUISITION HAVE ALREADY BEEN LIQUIDATED BY AWARD OF LIRE 114 MILLION IN THE ITALIAN COURTS TO THE TRUSTEE IN BANKRUPTCY (SEE PARA 1 OF TEXT), AND THAT THERE IS NO LEGAL BASIS FOR FURTHER COMPENSATION, WHETHER RAYTHEON'S ROLE IS CONSIDERED FROM THE VIEWPOINT OF A SHAREHOLDER OR CREDITOR. IN SO DOING, MANZARI CHOOSES TO IGNORE FACT THAT TRUSTEE IN BANKRUPTCY CONTESTED AND APPEALED AMOUNT OF DAMAGES AWARDED FOR ILLEGAL REQUISITION AS BEING TOO LOW, BUT HIS APPEAL WAS REJECTED. NOR DOES HE GIVE WEIGHT TO DAMAGE CAUSED BY ARBITRARY ACTIONS TAKEN BY MAJOR OF PALERMO THAT DEPRIVED OWNERS TO ACCESS TO THEIR ASSETS DURING CRITICAL PERIOD BEFORE AND AFTER BANKRUPTCY. IN ANY CASE, AIDE MEMOIRE FOR FIRST TIME PROVIDES IN WRITING GOI RESPONSES TO LONG-STANDING USG ESPOUSED CLAIM. HOLMES

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 jan 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: CLAIMS
Control Number: n/a
Copy: SINGLE
Draft Date: 11 aug 1978
Decaption Date: 01 jan 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 20 Mar 2014
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1978ROME14754
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Expiration:
Film Number: D780328-1100
Format: TEL
From: ROME
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1978/newtext/t19780873/aaaacjfc.tel
Line Count: 312
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: dfccf264-c288-dd11-92da-001cc4696bcc
Office: ACTION L
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 6
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 78 STATE 161901, 78 ROME 11256
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 19 may 2005
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 1767324
Secure: OPEN
Status: NATIVE
Subject: RAYTHEON CLAIM - GOI PROVIDES WRITTEN RESPONSE
TAGS: BDIS, CPRS, EINV, IT, US, RAYTHEON
To: STATE
Type: TE
vdkgvwkey: odbc://SAS/SAS.dbo.SAS_Docs/dfccf264-c288-dd11-92da-001cc4696bcc
Review Markings:
Sheryl P. Walter
Declassified/Released
US Department of State
EO Systematic Review
20 Mar 2014
Markings: Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014